No. 86-1762

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MANHATTAN EYE, EAR & THROAT HOSPITAL,

Petitioner,

—vs.—

NATIONAL LABOR RELATIONS BOARD and LOCAL 1199, DRUG, HOSPITAL AND HEALTH CARE EMPLOYEES UNION, RWDSU, AFL-CIO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF MANHATTAN EYE, EAR & THROAT HOSPITAL

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INTRODUCTION

The briefs submitted by Respondents Local 1199, Drug, Hospital and Health Care

Employees Union, RWDSU, AFL-CIO ("Union") and the National Labor Relations Board ("Board") seek to hide behind the "facts" (relying, in many cases on "facts" never found and inferences never drawn by the Board) and disregard the fundamental legal issues raised by the Petition for a writ of certiorari ("Petition"). Those legal issues include: Does this Court's decision in NLRB v. Gissel Packing Co., 395 U.S. 575 (1969), apply in the context of an employer's withdrawal of recognition from an incumbent union based on good faith doubt as to the union's majority status? More specifically, must there be more beyond the mere existence of an employer unfair labor practice in order to justify a bargaining order nullifying the expressed wishes of an apparent anti-union majority? If so, in what manner should the Gissel principles apply? Who should have the burden of proof as to whether there is or

is not a causal link between an employer unfair labor practice and the majority's disaffection from the union? At what point is that burden met? These are legal, not factual, issues. Respondents' reliance on the "substantial evidence" test as a basis for denying certiorari (Board Brief, pp. 8-9; Union Brief, p. 15) is therefore misplaced.

With respect to the second issue raised by the Petition, we believe that the Petition does not require further support in this reply brief, save for one point: The Respondents have simply assumed that, in case of a conflict between Sections 8(a)(1) and 8(c) of the National Labor Relations Act ("Act"), 29 U.S.C. § 158, Section 8(a)(1) necessarily prevails. In other words, Respondents are saying that once the employer free speech protected by Section 8(c) and the First Amendment actually succeeds in persuading an employee

to reject a union, it loses its protection. That would read Section 8(c) out of the Act.

ARGUMENT

I. The Decision Below that the Hospital Violated § 8(a)(5) of the Act Abrogates the Nurses' Right of Self Determination Under § 7 of the Act

A. The Gissel Standards Apply in the Context of a Withdrawal of Recognition

In Gissel, this Court confronted situations where employers had committed unfair labor practices during union organizing campaigns, thus arguably precluding fair elections. The Board wished simply to order the employers to bargain with the unions in lieu of elections, or despite election results. This Court wisely recognized that such bargaining orders could result in consummation of a collective bargaining agreement between an employer and a union that did not enjoy majority support.

Consequently, in Gissel this Court held that the Board must find that the unfair labor practice was outrageous and pervasive, or alternatively, that the practice actually impeded the election process, before it can enter the drastic remedy of a bargaining order. 395 U.S. at 613-615.

As we showed in the Petition (pp. 21-26), a number of Circuit Courts of Appeal have construed Gissel in the context of a withdrawal of recognition to mean that when such withdrawal is preceded by an employer unfair labor practice, the withdrawal should be voided and remedied by a bargaining order only if the Board expressly finds that the unfair labor practice actually caused the majority's disaffection from the union. Petition, pp. 21-26.

The Respondents have refused to say whether they agree with Manhattan Eye,

Ear & Throat Hospital's ("Hospital") interpretation of Gissel. Indeed, although the reach of Gissel is the central issue raised by the Petition, the Board does not cite, much less discuss Gissel, either in its decision below or its Brief to this Court (except once, on different point, Board Brief, p. 10). It is difficult to conclude from this that the Board truly acknowledges the authority of Gissel in the context of a withdrawal of recognition. Nor do the Board's Brief to this Court or decision below express the slightest concern about, or even awareness of, the possibility that the bargaining order infringed the nurses' Section 7 rights. Compare Gissel, at 614 ("effectuating ascertainable employee free choice becomes as important a goal as deterring employer misbehavior"). And, as shown below, the Second Circuit's enforcement of the Board's bargaining order fails to comport with Gissel's teachings.

Yet, while not acknowledging the controlling effect of Gissel, the Board's Brief shrewdly does not expressly deny that it applies. The Board evidently recognizes that to express forthrightly such denial (although such denial is the Board's underlying but unstated position) might enhance the likelihood of this Court's granting certiorari in light of the several Circuit Courts of Appeal that have expressly held that Gissel does apply. See Petition, pp. 21-26. Furthermore, the Board's present contention that the Circuit Court cases applying Gissel in circumstances like these might be distinguishable on their facts (see Board Brief, pp. 7-8 and n.2) misses the real issue -- those cases applied a fundamentally different legal standard than was applied here.

Absent guidance from this Court, the Board appears determined to refuse

recognizing that Gissel controls in the context of a withdrawal of recognition, and continue applying what amounts to a per se rule that the existence of an employer unfair labor practice automatically precludes the majority of the employees from exercising their right to refrain from union activity. Then, on appeal to the courts the Board will continue in each case to claim that its decision actually rested upon an unstated factual analysis of the effects of the unfair labor practice in dispute.

The Union's position is somewhat different than the Board's. The Union views the basic issue as being who bears the burden of proof on the question of whether the employer unfair labor practice actually caused the majority's disaffection from the union. Union Brief, pp. 4, 14, 25-26.

The Union construes Gissel and its progeny to mean that if an employer's

withdrawal of recognition had been preceded by an employer unfair labor practice, the employer has the burden of proving that the unfair labor practice did not cause the majority's disaffection which led to the withdrawal of recognition. Union Brief, p. 25. In other words, the Union contends that an employer in the Hospital's position must prove a negative -- i.e., that one event did not cause another. Indeed, the Union contends that in this case the Hospital failed to meet its burden because it did not call as witnesses all 51 nurses who petitioned the Hospital to withdraw recognition, to prove that they were unaware of the events constituting the unfair labor practice. Union Brief, p. 26. (No evidence was adduced at the hearing that any of those nurses were aware of the events.)

Even the Board does not share the Union's view of the law, a view which we

believe is incorrect for at least two reasons. First, Gissel's limitations on bargaining orders were motivated by solicitude for employees' rights. To hold that their rights will be protected only if the employer does or does not do something in a hearing to which the employees may not even be parties would seriously weaken those rights in a way inconsistent with Section 7 of the Act.

Second, the employer's burden of proof, as articulated by the Union, would be unmeetable in practice and therefore nothing more than a disguised version of the per se rule applied by the Board in this case. If, as the Union contends, all of the nurses who expressed a desire to cease supporting the Union should have been subpoenaed, examined, and cross examined about their states of mind, the hearing would have taken months, instead of a week. Furthermore, if the facts remained

the same except that the bargaining unit encompassed 1000 employees, rather than 100, should the Hospital have been required to present 500 witnesses to prove a negative? It is not surprising that the Board has not joined the Union's argument on this point.

This sub-issue -- who has the burden of proof and what it takes to meet that burden -- is itself so important as to merit this Court's review. The Circuit Courts of Appeal are in disagreement as to whether that burden lies, in the first instance, with the employer or with the Board's General Counsel. Compare Hotel, Motel and Restaurant Employees and Bartenders Union Local No. 19 v. NLRB, 785 F.2d 796, 799 (9th Cir. 1986) ("[i]f the General Counsel presents evidence showing that the union's decline in support was attibutable to the employer's misconduct, the employer's claim of a good

faith reasonable doubt [of the union's majority status] fails. Absent such evidence, the employer prevails.") with NLRB v. Nu-Southern Dyeing & Finishing, Inc., 444 F.2d 11, 16 (4th Cir. 1971) ("[a]n employer may avoid a bargaining order by showing that the unfair labor practices did not significantly contribute to . . . a loss of [union] majority").

B. Under the Standards of Gissel and Its Progeny, the Second Circuit Should Not Have Enforced the Board's Order

The Board's and the Union's arguments as to why the decision below was correct rely on "facts" never found by the Board. It is important to note what the Board did not find:

- It did not find that the unfair labor practice was "serious" as opposed to a "technical violation." Compare Union Brief, p. 27.

- It did not find that the unfair labor practice "was in furtherance of a

campaign to decertify the Union." See Board Brief, p. 2. (In fact, the unfair labor practice occurred between July 23 and August 9, 1984, which was after the decertification petition had been filed on July 18, 1984. ALJ Dec. A34, A6-7.[1])

- The Board made no finding as to whether any of the 51 nurses who petitioned the Hospital ever learned of the events constituting the unfair labor practice. Compare Board Brief, p. 9, asserting that "it was eminently reasonable for the NLRB to conclude . . . that knowledge of Supervisor James's . . . unlawful statements was not confined to the five nurses who testified at the hearing." Leaving aside whether the record would have supported such a conclusion, no such

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[1] References preceded by "ALJ Dec." or "Board Dec." are to the decisions of the Administrative Law Judge or of the Board, followed by the page of the Appendix to the Petition where the referenced material may be found.

conclusion is expressed or even hinted at in the Board's decision.

- The Board made no finding and drew no inference as to whether the unfair labor practice "tended to undermine the majority strength of the Union," as claimed in the Union Brief at p. 23. Although the Board did find that the unfair labor practice unlawfully interfered with employees' rights, it definitely did not say whether such interference had any effect on the Union's majority. It expressly disclaimed making any finding as to "whether there is evidence that James actually achieved a coercive effect." Board Dec. A123. Although such evidence may not have been necessary to support the finding of an unfair labor practice under Section 8(a)(1) of the Act, it should have been necessary to support a finding of a violation of Section 8(a)(5) of the Act and consequent entry of a bargaining order. See Gissel, at 614 (bargaining order may be

appropriate where the unfair labor practice had "tendency to undermine majority strength and impede the election processes").

- The Board made no finding as to whether the unfair labor practice would have had any effect on the decertification election sought by the nurses and blocked by the Board because of the Union's unfair labor practice charges. See ALJ Dec. A7. Under Gissel, such an election obviously would have been a preferred remedy, but the Board declined to say why it would not permit the election. The Board's and Union's basis for distinguishing People's Gas Systems, Inc. v. NLRB, 629 F.2d 35 (D.C. Cir. 1980) -- that an election was held there, confirming the majority's anti-union sentiment (Board Brief, pp. 7-8 n.2; Union Brief, pp. 28-29) -- is disingenuous. Here, the Union, with the Board's concurrence, has prevented the

employees from voting in a secret ballot election on rejecting or retaining the Union.

The Board and the Union have been quite imaginative in speculating what facts the Board might have found and inferences it might have drawn. The essence of the Board's decision, however, is its statement that the withdrawal of recognition in accordance with the majority's demand was invalid because it was not "in a context free of unfair labor practices of the type aimed at causing disaffection from the Union." Board Dec. A124. The Board's decision thus applied a per se rule that if an employer commits an unfair labor practice, its employees are then precluded from petitioning for the cessation of union representation, either through a decertification petition or through a direct petition to the employer.

This per se rule explains why the Board never bothered to address the actual

effect of the unfair labor practice, or the potential adverse effect of its bargaining order on the nurses' Section 7 rights. (One effect would be that the nurses could be forced into a multi-year agreement struck on their behalf by a union that they do not support.[2])

There is nothing in the Board's decision to indicate that it (and the Second Circuit Court of Appeals on the petition for enforcement) correctly applied Gissel. Gissel itself is not cited anywhere in the decisions of the Board and the Second Circuit.[3]

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[2] In addition to this serious effect, the Board's finding of a violation of Section 8(a)(5) of the Act led it to impose substantial financial penalties against the Hospital. See Petition, p. 41 n.6.

[3] This Court may wish to consider summarily reversing the Second Circuit and remanding the case for re consideration in light of Gissel. See Sup. Ct. Rule 23.1.

That the Board applied a per se rule is further confirmed by the absence of reference to the fact that the few nurses who testified for the Board about the unfair labor practice also testified that they were pro union and that James' remarks to them did not alter their stance, and to the fact that those nurses were not among the majority who petitioned the Hospital to cease bargaining with the Union. Compare Fremont Newspapers, Inc. v. NLRB, 436 F.2d 665, 673 (8th Cir. 1970) (refusing to enforce bargaining order in part because employees who were subject of unfair labor practice "remained strong Union adherents and took no part in the later filing of the formal decertification petition").

In sum, the Board did not find any facts that would support a bargaining order under Gissel. Consequently, the Board and the Union should not now be permitted to supply an after-the-fact rationalization

for the result reached. Compare NLRB v. Arrow Molded Plastics, Inc., 653 F.2d 280, 284 (6th Cir. 1981) ("It is . . . inappropriate to enforce bargaining orders where the Board's rationale for the order was conclusory . . .") and NLRB v. Gruber's Super Market, Inc. 501 F.2d 697, 704 (7th Cir. 1974) (Board must "explain its conclusions in terms reviewing courts can understand").[4]

II. The Questions Presented Deserve Supreme Court Review

Neither Respondent has disputed that the legal issues raised by this case are important and deserving of this Court's attention. Given the need for a clearly

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[4] Furthermore, the Board's decision herein should be subjected to heightened judicial scrutiny because it reversed the administrative law judge. See NLRB v. Tru-Line Metal Products Co., 324 F.2d 614, 615 (6th Cir. 1963), cert. denied, 377 U.S. 906 (1964).

defined and nationally consistent federal labor law, and given the uncertainty engendered by the reasoning and result reached below in comparison to similar cases in other Circuits, the Hospital respectfully suggests that certiorari is appropriate. That would enable this Court to resolve important questions about the reach of its decision in the Gissel case.

CONCLUSION

For the reasons set forth above and in the Petition, the Hospital respectfully requests its Petition be granted.

June 17, 1987

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